

GMS Flash Alert

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Australia - High Court Decision Confirms Federal Court's Tax Residency Ruling

As its ability to identify income from overseas increases, the Australian Taxation Office (ATO) is advising taxpayers that the Commissioner of Taxation's application for special leave in the residency matter of *Harding v Commissioner of Taxation* [2019] FCAFC 29 has been refused by Australia's High Court.¹ This means the decision of the Full Federal Court² stands. That Court concluded, and now appears to establish the principle, that a permanent place of abode need not be the same particular dwelling (i.e., the same flat or house) in a foreign country. (For prior coverage, see GMS Flash Alert [2019-039](#), 1 March 2019.)

The decision comes seven months after the Full Federal Court found in favour of the taxpayer.

WHY THIS MATTERS

An employee's tax residency position, coupled with location of work and payer, will dictate an employer's Australian PAYG withholding and reporting obligations.

It is therefore important that employers have the appropriate processes in place to properly assess the facts and circumstances and identify an employee's Australian tax residence position, and thereby its tax reporting and payroll obligations, especially in light of the decision of the Full Federal Court.

Facts of Case and Court's Ruling

The case focused on whether an individual who had left Australia and commenced living in a series of apartments in Bahrain had ceased being an Australian tax resident. To do this, he was required to demonstrate that he was no longer residing in Australia under ordinary concepts and had established a permanent place of abode outside of Australia.

According to the conclusion reached by the Full Federal Court, a permanent place of abode need not be the same particular dwelling (i.e., the same flat or house) in a foreign country. Rather, it could be a country or state (in Harding's

case, Bahrain). The decision provides a wider interpretation of the meaning of “permanent place of abode” than had previously been the case.

Impact on Other Cases, Policy

Administrative Appeals Tribunal Developments

This reasoning has already been applied in the recent Administrative Appeals Tribunal (AAT) matter of Handsley and Commissioner of Taxation [2019] AATA 917.³ In this case, the taxpayer lived in multiple overseas locations but because his longest stay in any one of those particular countries was just 43 days, this was insufficient to come within the broader interpretation of permanent place of abode adopted in Harding. In other words, he had failed to establish himself in any one location.

Board of Taxation and Residency Recommendations

The decision in Harding comes at the same time as the Board of Taxation continues with its review of the income tax residency rules for individuals. The Board provided its recommendations to Treasury in November 2018 following a consultation period, but the government has not yet advised of its response.⁴

KPMG NOTE

We anticipate that the government’s response to the Board of Taxation’s recommendations could be part of its next federal Budget.

FOOTNOTES:

1 For notification of the High Court’s dismissal of the ATO’s special leave, click [here](#).

2 The Federal Court decision of February 2019, can be found by clicking [here](#).

3 To see Handsley and Commissioner of Taxation (Taxation) [2019] AATA 917 (17 May 2019) on the website of the Australasian Legal Information Institute, click [here](#). *Please note that this is a 3rd party (non-KPMG, non-governmental) website. Provision of this link does not represent an endorsement by KPMG of this website.*

4 For more on the Board of Taxation’s look at rules that apply to determine the residency status of individuals for income tax purposes, click [here](#).

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